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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 590

AMERICAN PIPE & STEEL CORPORATION, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent's Brief in Opposition is a subtle effort to divert the Court's attention from the Questions Presented in the Petition for Certiorari, and to so confuse the issues as to make it appear that the dispute primarily involves a disagreement with respect to the facts. While we believe that the thrust of this effort is sufficiently transparent as to be manifest to the Court, we set forth in this Reply Brief some of the more flagrant examples of Respondent's efforts to becloud the true issues presented.

1. The three questions presented by the Petition for Writ of Certiorari are set out at p. 2, thereof. They are not and cannot be fairly summarized by the purported Question Presented in Respondent's Brief in Opposition (at p. 2). Respondent's failure fairly to meet the questions presented by Petitioner, aside from being unusual in the certiorari practice, permits Respondent to make arguments entirely unresponsive to the questions presented by Petitioner to this Court. This would clearly resolve many perplexing problems presented either by petitioners seeking certiorari or respondents opposing certiorari.

2. The main portion of the statement of facts set out in the Brief in Opposition is concededly taken from the Opinion of the Court of Appeals (Br. in Opp., pp. 3-6). The portion of the statement, beginning with the words "With the onset" on p. 3 and concluding with the word "respectively" on p. 6 should have been placed in quotation marks, to acknowledge their verbatim derivation. In view of the argument made by Petitioner that the Court of Appeals overstepped the bounds of appropriate appellate review by taking upon itself the fact-finding function, reliance upon a statement of facts taken from the Opinion of the Court of Appeals, is plainly unjustified. Respondent seeks however to answer our challenge that the Court of Appeals erred in its decision, by relying upon that very decision.

3. At the outset of its argument, Respondent seeks to convey the impression that both courts below "found" all the facts necessary and appropriate to support the decision. See the references on p. 7 of the Brief in Opposition to "both courts below held" (line 1); "two courts * * * have sustained" (lines 17-18);

"In view of these concurrent findings" (lines 21-22). Clearly this as a "strawman" of Respondent's own making. Petitioner's contentions are that the Tax Court's findings are deficient in the various respects detailed in the Petition; and that the Court of Appeals not only sanctioned these errors, but compounded them by making findings of its own. Thus, the findings critical to the determination of the case were not made by the Tax Court—which is charged under law with the duty to do so—but were made by the Court of Appeals—which is precluded by law from doing so. Petitioner does not ask this Court to overturn the "concurrent findings" made by the "two courts" below. Petitioner's contentions go to the *functions* of the two courts below: to the scope of the fact-finding obligation; to the permissive boundaries of appellate review; and to the precise significance of the burden of proof in Section 129 cases. None of these contentions fall within the principle imported into this case by the Respondent through reliance upon *Comstock* v. *Group of Investors,* 335 U.S. 211, 214.

4. The *Comstock* decision makes it clear that where certiorari is granted on the basis of an assurance that the facts are "unchallenged", this Court will accept such facts as final (335 U.S. at 213-14). We have no quarrel with this principle except to say that it has no applicability here. *Kelley* v. *Everglades Drainage District,* 319 U.S. 415, which is applicable here, establishes a principle at least of equal dignity and makes it clear that this Court will not tolerate inadequate or deficient findings, and will not permit appellate courts "to search the record and analyze the evidence in order to supply findings which the trial court failed to make." (319 U.S. at 421-22). It is upon the principle of the

Kelley case that Petitioner relies, and to which Respondent has failed to respond.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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